

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

COMMERCIAL DEVELOPMENT
COMPANY, a Missouri corporation;
ENVIRONMENTAL LIABILITY
TRANSFER INC., a Missouri corporation; and
WASH PAPER LLC, a Missouri Washington
limited liability company as assign,

Plaintiffs,

v.

ABITIBI-CONSOLIDATED INC., a foreign
corporation, JOHN DOES 1-10, officers
directors, agents or employees of ABITIBI-
CONSOLIDATED, INC., individually and
their marital communities composed thereof,

Defendants.

Case No. C07-5172RJB

ORDER ON MOTION TO
INTERVENE

This matter comes before the Court on Vanessa A. Herzog and her marital community's Motion to Intervene (Dkt. 27) and motion for a monetary sanction against Plaintiffs' counsel (Dkt. 34). The Court has considered the pleadings filed in support of and in opposition to these motions and the file herein.

I. FACTS AND PROCEDURAL BACKGROUND

Plaintiffs originally filed this action on March 21, 2007, in Pierce County Washington

1 Superior Court, alleging Defendants wrongfully refused to sell Plaintiffs commercial real property
2 located in Steilacoom, Washington. Dkt. 2-3. The subject property is approximately 83 acres and
3 was a former paper mill site. *Id.* Plaintiffs filed a Notice of Lis Pendens in Pierce County Superior
4 Court and recorded the Notice of Lis Pendens in the county real property records on March 23,
5 2007. Dkt. 1-2, at 8-15. On April 4, 2007, Abitibi-Consolidated Inc. (“Abitibi”) removed the case
6 to this Court. Dkts. 1 and 2.

7 The First Amended Complaint alleges that in the spring of 2006, Abitibi, through its real
8 estate agent Vanessa Herzog (the moving party here), listed the subject property for sale. Dkt. 25, at
9 2. Plaintiffs allege that on June 1, 2006, as a result of “substantial negotiations” Plaintiffs submitted
10 an executed Letter of Intent to Abitibi. *Id.* at 7. Plaintiffs allege that the Letter of Intent was
11 “legally binding upon Purchaser and Seller subject only to negotiation and execution of a mutually
12 acceptable Purchase and Sale Agreement.” *Id.* at 9. Plaintiffs allege that they were “formally
13 notified of [Environmental Liability Transfer’s] selection as the purchaser of the property by the
14 agent of [Abitibi], Ms. Herzog, by email dated July 27, 2006.” *Id.* at 8. Plaintiffs’ allege that the
15 email states: “Environmental Liability Transfer, Inc. has been selected as the purchaser for the Abitibi
16 property. The purchase price in \$4,000,000. I will be forwarding the signed letter of intent and
17 purchase and sale agreement shortly.” *Id.* Plaintiffs allege that despite spending substantial sums on
18 due diligence and acting with good faith to complete the transaction, on February 16, 2007,
19 Defendants demanded additional compensation for the property. *Id.* at 9-10. Plaintiffs allege that
20 they recently discovered that Abitibi and “John Does were showing the property to prospective
21 purchasers and were in the process of negotiating a new agreement with a prospective purchaser for
22 \$5,000,000.” *Id.* at 10. Plaintiffs make claims for breach of contract, promissory estoppel,
23 violations of the Abitibi Code of Ethics and Principles of Ethical Behavior: violations of Sarbanes
24 Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745, violations of the implied covenants of good
25 faith and fair dealing, and violations of the Washington State Consumer Protection Act, RCW 19.86.

1 Dkt. 25, at 11-13. Plaintiffs seek injunctive relief, specific performance of the real estate contract,
2 and monetary damages. *Id.* at 13-14.

3 On September 18, 2007, Vanessa A. Herzog and her marital community (“Herzog”) filed
4 the instant Motion to Intervene. Dkt. 27. Herzog is a real estate agent with GVA Kidder Mathews,
5 and was Abitibi’s agent in the transaction at issue. Dkt. 32, at 1. Herzog states that GVA Kidder
6 Mathews also employs Linn Larsen, Plaintiff’s agent in the transaction at issue here. *Id.* Herzog
7 offers the following in support of her motion: Herzog alleges that the subject property had some
8 environmental contamination and that it was Abitibi’s intention to fully remediate the site before
9 transferring the site to a financially qualified purchaser. *Id.* at 2. According to Herzog, Abitibi
10 wanted “blanket indemnity” from the purchaser for any environmental contamination. *Id.* She
11 states that,

12 Towards the end of 2006, [Abitibi] informed [her]that it wished to proceed with
13 further discussions with Plaintiff. [Abitibi] subsequently informed [her] that it would
14 not execute a [Letter of Intent] as it did not wish to be committed to a buyer until the
15 remediation was nearing completion, and would bind itself only with a fully
16 negotiated Purchase and Sale Agreement. At no time did [Abitibi] sign the [Letter of
17 Intent] or deliver a copy of the [Letter of Intent] by any means to [Plaintiffs].

18 *Id.* at 2. She explains that she sent the email (referenced above and as it appears in the First
19 Amended Complaint) not to Plaintiffs, but to a title company which was expected to act as the
20 closing agent. *Id.* According to Herzog, it is “standard industry practice for the seller to provide
21 title information to the buyer to be reviewed as part of the feasibility review.” *Id.* at 3.

22 Herzog states that Abitibi provided a Purchase and Sale Agreement to Plaintiffs, containing
23 the required indemnity provisions. *Id.* She states that Plaintiffs returned a revised Purchase and Sale
24 Agreement materially limiting the indemnity provisions. *Id.* According to Herzog, Abitibi elected to
25 pursue other alternatives after receiving the altered document. *Id.*

26 She states that her listing agreement has now expired, and but for the filing of this suit and
the lis pendens, she would have earned a commission of around \$270,000. *Id.*

1 Herzog attaches a Complaint in Intervention to her motion with three causes of action. Dkt.
2 28. First, she seeks a judicial declaration that “the conduct on the part of Ms. Herzog relied on by
3 [Plaintiffs] cannot, as a matter of law, create any liability on legal or equitable grounds for Ms.
4 Herzog, GVA Kidder Mathews or [Abitibi]” to Plaintiffs. *Id.*, at 2-3. Secondly, she makes a claim
5 for tortuous interference, alleging that Plaintiffs here have “wrongfully and tortuously interfered with
6 the sale of the property to third parties causing damages to Ms. Herzog in an amount which will be
7 proven with specificity at trial.” *Id.* at 3. Lastly, Herzog makes a claim for damages and attorneys
8 fees under RCW 4.28.328. *Id.*

9 Herzog argues that she should be permitted to intervene because she has a strong interest in
10 this matter. She notes that Plaintiffs have implicated her as the individual whose conduct created the
11 legal liability alleged. Dkt. 27, at 9. She notes that Plaintiff’s first interrogatory responses indicated
12 that she was one of the “John Doe Defendants” against whom Plaintiff was asserting a claim for a
13 million dollars, although a second set of responses removes her name. *Id.* She believes that the
14 removal of her name was motivated by Plaintiffs’ counsel’s concern regarding a conflict of interest.
15 *Id.* Herzog’s counsel states that Plaintiffs’ counsel also represents GVA Kidder Mathews. Dkt. 31,
16 at 2-3. (Herzog is a real estate broker with GVA Kidder Mathews.) Dkt. 32, at 1. Herzog argues
17 that her interest are divergent from Abitibi’s interests because it is her conduct which is alleged to
18 have created the legal liability for Abitibi. Dkt. 27, at 10.

19 Plaintiffs oppose the motion arguing: that 1) Herzog does not have a protectable interest in
20 the issue that is being litigated in the present dispute, 2) Courts have consistently refused to allow
21 intervention in breach of contract disputes by non-contracting/non-third party beneficiaries
22 applicants, 3) Herzog’s contingent tortuous interference claim does not create a right to intervention,
23 4) disposition of Plaintiff’s claims against Abitibi will not impair Herzog’s future ability to recover
24 against either Plaintiff or Abitibi, 5) Abitibi will adequately represent Herzog’s interest in this
25 dispute, and 6) the Court should not grant permissive intervention to Herzog. Dkt. 33.

1 Herzog argues in her Reply that she seeks to intervene principally to defend against claims
2 affirmatively asserted against herself and her marital community. Dkt. 34. The relief she seeks is a
3 declaration that her conduct did not and cannot create any liability for either herself, GVA Kidder
4 Mathews, or Abitibi. *Id.* Plaintiff alleges that Mr. Osborn, Plaintiffs' counsel and GVA Kidder
5 Mathews' counsel, is in "possession of directly relevant privileged information from an adverse party
6 about the very business practices at issue in the lawsuit." *Id.*, at 1 n1. She alleges that if Plaintiffs'
7 counsel was complying with the Rules of Professional Conduct, he would have been the one bringing
8 this motion. *Id.*

9 Further, in her Reply, Herzog moves for sanctions against Mr. Mullaney at Foster Pepper in
10 the amount of \$3,500.00. Dkt. 34. She alleges that the first set of Interrogatory Responses which
11 named her as a "John Doe Defendant" were improperly certified by Mr. Mullaney to be in
12 compliance with Fed. R. Civ. P. 26(g). Dkt. 34, at 3.

13 **II. DISCUSSION**

14 **A. INTERVENTION OF RIGHT**

15 Fed. R. Civ. P. 24(a) provides:

16 Upon timely application anyone shall be permitted to intervene in an action (1) when a statute
17 of the United States confers an unconditional right to intervene; or (2) when the applicant
18 claims an interest relating to the property or transaction which is the subject of the action and
19 the applicant is so situated that the disposition of the action may as a practical matter impair
or impede the applicant's ability to protect that interest, unless the applicant's interest is
adequately represented by existing parties.

20 Fed. R. Civ. P. 24(a). "Under Federal Rule of Civil Procedure 24(a)(2), a party is entitled to
21 intervene where (1) the intervention is timely; (2) the applicant has a significant protectable interest
22 relating to the property or transaction that is the subject of the action; (3) the disposition of the
23 action may, as a practical matter, impair or impede the applicant's ability to protect its interest; and
24 (4) the existing parties may not adequately represent the applicant's interest." *Gonzalez v. Arizona*,
25 485 F.3d 1041, 1051 (9th Cir. 2007)(*internal citations omitted*). Rule 24(a) is liberally construed in

1 favor of intervenors. *California ex rel Lockyer v. U.S.*, 450 F.3d 436, 440 (9th Cir. 2006)

2 1. Timely Intervention

3 Upon consideration of the four requirements which must be met under Fed. R. Civ. P.
4 24(a)(2), Herzog should be permitted to intervene in this matter. There is no dispute that Herzog's
5 application to intervene was timely, and so she meets the first requirement under Fed. R. Civ. P.
6 24(a). This opinion will now examine each of the remaining three requirements in turn.

7 2. Significant Protectable Interest

8 As to the second requirement, she has shown a significant protectable interest relating to the
9 transaction that is the subject of the action. *Gonzalez*, at 1051. "An applicant has a significant
10 protectable interest in an action if (1) it asserts an interest that is protected under some law, and (2)
11 there is a 'relationship' between its legally protected interest and the plaintiff's claims." *California ex*
12 *rel Lockyer v. U.S.*, 450 F.3d 436, 441 (9th Cir. 2006) (citing *Donnelly v. Glickman*, 159 F.3d 405,
13 409 (9th Cir.1998))(internal citations omitted).

14 Under Washington law, real estate brokers and agents generally "do not have implied
15 authority to make a contract of sale, or make representations as to the quality, condition, or income
16 of property, but are limited to finding a purchaser, showing the property to him and identifying it or
17 indicating its boundaries." *Larson v. Bear*, 38 Wash. 2d 485, 489-90 (1951); *Sound Built Homes,*
18 *Inc. v. Windermere Real Estate/South Inc.*, 118 Wn. App. 617, 625-26 (2003)(holding that, unless
19 otherwise agreed, a real estate agent has authority to procure a willing and able buyer, but not
20 authority to sell the land). According to Herzog, her principal reason for seeking to intervene is to
21 defend herself and her marital community from any potential liability stemming from the allegations
22 in the First Amended Complaint involving her. Dkt. 34. For example, the First Amended Complaint
23 alleges that Plaintiff was "formally notified of its selection as the purchaser of the property by the
24 agent of [Abitibi], Ms. Herzog, by email dated July 27, 2006." Dkt. 25 at 8. Herzog denies that this
25 was the purpose of the email and seeks declaratory relief that her conduct did not and cannot create

1 any liability for herself and Abitibi. Dkt. 32, at 3. At this stage in the litigation, Herzog has
2 articulated a sufficient protectable interest in protecting herself and her marital community to
3 intervene as of right.

4 Turning to the second prong of this requirement to intervene as of right, there is a
5 relationship between Herzog's legally protected interest and the Plaintiff's claims. *California ex rel*
6 *Lockyer, at 441*. "An applicant generally satisfies the 'relationship' requirement only if the resolution
7 of the plaintiff's claims actually will affect the applicant." *Donnelly*, at 410. Herzog argues that if
8 Plaintiffs prevail, there is a chance that Abitibi will seek redress from her. Herzog will then be forced
9 to defend herself and her marital community which she is trying to do now. Accordingly, resolution
10 of Plaintiffs' claims will actually affect Herzog. Although Abitibi has not filed a Response to this
11 motion, Herzog has adequately alleged a relationship between her right to defend herself and
12 Plaintiff's claims.

13 3. Impairment

14 The third requirement that Herzog must meet under Fed. R. Civ. P. 24(a)(2) is that the
15 disposition of this dispute may, as a practical matter, impair or impede her ability to protect her
16 interest. *Gonzalez*, at 1051. The Ninth Circuit has held in light of this requirement, that "[i]f an
17 absentee would be substantially affected in a practical sense by the determination made in an action,
18 he should, as a general rule be entitled to intervene." *Southwest Center for Biological Diversity v.*
19 *Berg*, 268 F.3d 810 822 (9th Cir. 2001)(*internal citations omitted*). As stated above, if a
20 determination is made in this case that Herzog's actions created liability for Abitibi, her interests
21 would be both legally and practically affected. She may be forced to defend a latter action and may
22 be bound by factual or legal findings in this case. Accordingly, she meets this requirement to
23 intervene as of right.

24 4. Representation of Herzog's Interest

25 Lastly, Abitibi may not adequately represent Herzog's interest, and so she meets the final
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1 requirement to intervene as of right.

2 In assessing whether a present party will adequately represent an intervenor-
3 applicant's interests, we consider several factors, including whether [a present party]
4 will undoubtedly make all of the intervenor's arguments, whether [a present party] is
capable of and willing to make such arguments, and whether the intervenor offers a
necessary element to the proceedings that would be neglected.

5 *Prete v. Bradbury*, 438 F.3d 949, 956 (9th Cir. 2006)(*internal citations omitted*). Here, it is an open
6 question as to whether the existing parties will make all of Herzog's arguments. Abitibi's silence on
7 this motion to intervene calls into question its willingness to make the arguments in Herzog's
8 defense. Herzog also offers an element to these proceedings that otherwise may be neglected: that is
9 the liability of the real estate agent on the facts alleged.

10 Moreover, it is possible that in the end the existing parties and Herzog will not have the
11 same ultimate objective. *See Prete* at 956. Plaintiffs' interests and Herzog's interests in defending
12 herself from the allegations in the First Amended Complaint clearly do not have the same ultimate
13 objective. Abitibi and Herzog both are interested in a finding that there is no binding agreement
14 between Abitibi and Plaintiffs so, to some degree have a similar objective. However, Abitibi and
15 Herzog's interests may also diverge. If Plaintiff prevails, Herzog wants a declaration finding her free
16 from liability for her actions. Abitibi may want the reverse. Herzog has sufficiently shown that her
17 interests may well be inadequately represented by the existing parties.

18 **B. PERMISSIVE INTERVENTION**

19 Herzog should also be permitted to intervene under Fed. R. Civ. P. 24(b)(2). Fed. R. Civ. P.
20 24(b) provides:

21 Upon timely application anyone may be permitted to intervene in an action: (1) when a
22 statute of the United States confers a conditional right to intervene; or (2) when an
23 applicant's claim or defense and the main action have a question of law or fact in common. . .
In exercising its discretion the court shall consider whether the intervention will unduly
delay or prejudice the adjudication of the rights of the original parties.

24 Fed. R. Civ. P. 24(b). "An applicant who seeks permissive intervention must prove that it meets
25 three threshold requirements: (1) it shares a common question of law or fact with the main action;

1 (2) its motion is timely; and (3) the court has an independent basis for jurisdiction over the applicant's
2 claims.” *Donnelly*, at 412.

3 There are common questions of law and fact between Herzog’s requested relief and the
4 issues raised by the existing parties in the case. For instance, the legal significance of Herzog’s
5 email, dated July 27, 2006, raises common issues of law and/or fact between Plaintiffs’ case and
6 Herzog’s claim for declaratory relief. Her remaining tortious interference with a contract claim and
7 her claim under RCW 4.28.328 share common issues of fact and law with Abitibi’s counterclaim for
8 relief under RCW 4.28.328. Accordingly, Herzog meets the first of the threshold requirements for
9 permissive intervention. There is no dispute that her motion is timely, and so she meets the second
10 requirement for permissive intervention. Lastly, it appears that at this stage, the court has a basis for
11 jurisdiction over Herzog's claims: diversity jurisdiction pursuant to 28 U.S.C. § 1332. Although the
12 Court notes that the caption in the First Amended Complaint lists Plaintiff Wash Paper LLC as a
13 “Missouri Washington limited liability company,” the Notice of Removal alleges that Wash Paper
14 LLC is a Missouri corporation. Plaintiffs should clarify this issue for the Court and move to amend
15 the First Amended Complaint if necessary. Herzog has met the three threshold requirements for
16 permissive intervention.

17 Moreover, Plaintiffs have failed to show that Herzog’s intervention will unduly delay or
18 prejudice the adjudication of the rights of the original parties. Her motion has occurred relatively
19 early in the case. Trial is set to begin in the end of May 2008. Her declaratory relief address one of
20 the core issues in the case. Her other two claims relate to counterclaims asserted by Abitibi. In the
21 interest of fully and fairly inquiring into the merits of the allegations here, Herzog’s Motion to
22 Intervene (Dkt. 27) should be granted.

23 **C. MOTION FOR SANCTIONS**

24 Herzog moves for sanctions against Mr. Mullaney at Foster Pepper in the amount of
25 \$3,500.00. Dkt. 34. She alleges that the first set of Interrogatory Responses which named her as a
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1 “John Doe Defendant” were certified by Mr. Mullaney to be in compliance with Fed. R. Civ. P.
2 26(g). Dkt. 34, at 3. Although Herzog acknowledges that after pointing out that she was included
3 as a “John Doe Defendant” Plaintiffs’ counsel amended the answer and removed her name, she still
4 argues that she is entitled to sanctions. *Id.* at 3-4.

5 Her motion should be denied without prejudice. Plaintiffs did not have an opportunity to
6 respond to the motion because it was made in Herzog’s reply. Moreover, Herzog did not properly
7 note the motion for sanctions in compliance with Fed. Local R. Civ. P. 7.

8 **D. CONFLICTS OF INTERESTS**

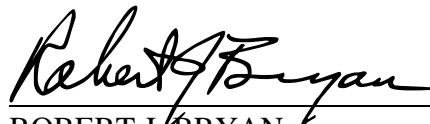
9 The Court is concerned with varying allegations of conflicts of interest. Parties are reminded
10 that the Rules of Professional conduct apply. The Court expects that all involved will act
11 professionally.

12 **III. ORDER**

13 Therefore, it is hereby **ORDERED** that Vanessa A. Herzog and her marital community’s
14 Motion to Intervene (Dkt. 27) is **GRANTED** and her Motion for Sanctions (Dkt. 34) is **DENIED**
15 **WITHOUT PREJUDICE.**

16 The Clerk of the Court is instructed to send uncertified copies of this Order to all counsel of
17 record and to any party appearing *pro se* at said party’s last known address.

18 DATED this 1st day of October, 2007.

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21 ROBERT J. BRYAN
22 United States District Judge
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